Supreme Court, U.S.
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No. 98-

IN THE

Supreme Court of the United States

JUDY BAKER; MYRA ALLISON; BONNIE JOHNSON,
Petitioners,

v.

PATRICIA HADLEY,
COLUMBIANA COUNTY AUDITOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

STEWART R. JAFFY
Counsel of Record
MARC J. JAFFY
STEWART JAFFY & ASSOC. CO., L.P.A.
306 E. Gay Street
Columbus, OH 43215
Telephone:614/228-6148
Facsimile: 614/228-6140

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

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QUESTION PRESENTED FOR REVIEW

Whether job duties "envisioned" by a newly elected public official for existing public employees' jobs deprive those employees of the First Amendment protection from political discharge recognized by *Elrod v. Burns*, 427 U.S. 347 (1976), and provide the public official with immunity, especially where the employees' jobs have not been jobs for which politics is a legitimate requirement and the "envisioned" job duties are used as a pretext for termination.

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CITATION OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS

The opinion of the Court of Appeals for the Sixth Circuit is reported at 167 F.3d 1014 (1999). The opinion is reprinted in the appendix hereto, p. A-1.

The decision of the United States District Court for the Northern District of Ohio (Gaughan, J.) is unreported. The opinion is reprinted in the appendix hereto, p. B-1.

The opinion of the Court of Appeals for the Sixth Circuit in the initial appeal in this case, *Baker v. Hadley*, 72 F.3d 129 (6th Cir. 1995) (unpublished per curiam), *cert. denied*, 116 S. Ct. 1876 (1996), is unreported. The opinion is reprinted in the appendix hereto, p. C-1.

The initial decision of the United States District Court for the Northern District of Ohio (Wells, J.) is unreported. The opinion is reprinted in the appendix hereto, p. D-1.

JURISDICTION

On February 12, 1999, the Sixth Circuit Court of Appeals entered judgment in the instant action. The Supreme Court has jurisdiction to review this decision under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution:

> Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or en-

force any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1985:

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States,

or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. §1988:

Sec. 1988. Proceedings in vindication of civil rights

(a) The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. 1681 et seq.), the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), or section 13981 of this title,, [1] the court, in its discretion, may allow the prevailing

party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

STATEMENT OF THE CASE

A. Basis of Jurisdiction in the Lower Courts

Plaintiffs filed a Complaint in the United States District Court for the Northern District of Ohio, Eastern Division, which was assigned case number 4:92 CV 0495, alleging violations of 42 U.S.C. §§1983, 1985 and 1988. The District Court had jurisdiction pursuant to 28 U.S.C. §§1331 and 1343, as well as the First, Fifth and Fourteenth Amendment of the United States Constitution. The complaint also raised a pendant state law claim.

On December 6, 1994, the District Court denied Auditor Hadley's first motion for summary judgment on the qualified immunity issue (the claim against her in her individual capacity). The District Court also denied summary judgment on Counts I (which alleged improper political discharge) and III (a pendent state wrongful discharge claim) and granted

summary judgment on Count II (which alleged improper discharge due to Union activity).

The Auditor filed an interlocutory appeal on the qualified immunity issue. The Sixth Circuit Court of Appeals reversed the lower Court and remanded the case for further determination of the qualified immunity issue. *Baker v. Hadley*, 72 F.3d 129 (6th Cir. 1995) (unpublished per curiam), *cert. denied*, 116 S. Ct. 1876 (1996).

On remand the case was transferred to the docket of a newly appointed judge. Defendant filed a new motion for summary judgment relating to the entire case with the District Court. The Auditor attached to the new motion for summary judgment new affidavits and, for the first time, claimed that the firing was due to "restructuring."

The District Court, even though summary judgment had been previously denied on Counts I and III, and the only issue the Sixth Circuit had ordered it to consider was the qualified immunity issue, proceeded to grant summary judgment with respect to the entire case.

Plaintiffs appealed to the Sixth Circuit Court of Appeals which had jurisdiction under 28 U.S.C. §1291. The District Court's grant of summary judgment was filed on September 22, 1997, and the Plaintiffs' Notice of Appeal was timely filed on October 21, 1997. The appeal was from a final decision disposing of all claims. The Sixth Circuit Court of Appeals affirmed the District Court's grant of Summary Judgment.

B. Statement of Facts

On March 11, 1991, her first day in office, Columbiana County Auditor Patricia Hadley fired Plaintiffs Judy Baker, Bonnie Johnson and Myra Allison.

The Deposition of Auditor Hadley took place on November 17, 1992. At that time, when asked her reasons for discharging the Plaintiffs in this case, Auditor Hadley did not even mention "restructuring" the Auditor's office. Instead, she testified that she fired Plaintiffs because she did not believe they could be "loyal" and she intended to have all her employees be loyal employees.

Republican Auditor Hadley's doubts about Plaintiffs' "loyalty" was based on Plaintiffs' working for Auditor Hadley's Democratic predecessors.

The issue in this case, whether Defendant Hadley acted properly in firing Plaintiffs for political reasons, depends on whether Plaintiffs' jobs are those for which politics is a legitimate requirement. The structure of the Columbiana County Auditor's office and the nature of Plaintiffs' job duties demonstrate that Plaintiff's jobs are not those for which politics could be a legitimate job requirement.

Auditor Bell, the Auditor Ms. Hadley replaced, had kept all authority in the Auditor's office to himself. Auditor Bell delegated no authority to his employees to speak or act for him and no employees were entitled or authorized to make decisions for him. All employees in the office reported directly to Auditor Bell who made all the decisions.

At the time they were fired, Plaintiffs had the following job descriptions: Ms. Allison, "Budgetary Financial Specialist"; Ms. Johnson, "Settlements/Abstracts/Tax Rate Operator Specialist"; and Ms. Baker, "Estate Tax/Estate Inventory/Licenses Clerk."

The nature of Plaintiffs' job duties was established in an appeal from the State Personnel Board of Review. In that appeal, the Franklin County Court of Appeals found

> the job duties actually performed by appellants do not establish that they acted for or in the place of the auditor. The record did not demonstrate that any of the appellants had the authority to speak for, act for, or make decisions for the auditor. Appellants did not have policy-making authority.

Baker v. Hadley, Franklin Co. App. No. 94APE10-1550, 94APE10-1551, 94APE10-1552, (6/6/95) (unreported and attached as Appendix F), at p. F-12, F-13, discretionary appeal not allowed, 74 Ohio St.3d 1422 (1995).

REASONS FOR GRANTING THE WRIT

The Sixth Circuit held that "we need not concern ourselves with Plaintiffs' particular job responsibilities" because the Auditor "envisioned these positions to be confidential, policymaking jobs for which political affiliation was an appropriate requirement." *Baker* at 1019.

Under the Sixth Circuit's test, the protection this Court has given to public employees in *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Rutan*

v. Republican Party of Illinois, 497 U.S. 62 (1990) is rendered meaningless.

Under the Sixth Circuit's test, any public employee can be fired regardless of whether or not their jobs are ones for which politics would be a legitimate job requirement. All a public employer would have to do would be "envision" a job that required politics.

The Sixth Circuit's test ignores the reality of the job duties required by a public employee's job. The actual job duties the individuals were performing must be considered as a vital aspect in determining whether or not a new office holder can legitimately envision new job duties which are political in nature, or is claiming restructuring as a pretext to justify political terminations of public employees.

In the present case, the job duties performed by Plaintiffs were not political in nature. Nor was there any basis for legitimately envisioning political job duties for Plaintiffs whose jobs, at the time they were fired, were: 1) "Budgetary Financial Specialist" [Ms. Allison]; 2) "Settlements/Abstracts/Tax Rate Operator Specialist" [Ms. Johnson]; and 3) "Estate Tax/ Estate Inventory/Licenses Clerk." [Ms. Baker.]

Is it reasonable to envision jobs such as the new jobs which the Auditor claims support her decision for individuals holding the jobs held by Plaintiffs?

Another factor which the Sixth Circuit's decision fails to consider is that it is impossible for a Plaintiff to directly contradict an office-holder's claim that a restructuring is the reason for termination.

The only way for a Plaintiff to contradict a claimed justification of restructuring in a situation such as the present one is through inferences about the validity of the claimed justification, as well as the reasonableness of such claimed restructuring, which inferences may only be drawn by the jury from the facts.[1]

An office holder will always claim restructuring as the basis for justifying political terminations -- especially under the Sixth Circuit's test in the present case, relying solely on the alleged intent of the new office holder.

As a result, under the Sixth Circuit's test, *Elrod* and its progeny are rendered meaningless.

The First Amendment protection is lost when an Officeholder can receive absolute protection and immunity by claiming that "restructuring" or newly "envisioned" job duties justify political terminations when the job duties previously performed had no legitimate political requirement.

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[1] In the present case, for example, the inferences that Auditor Hadley's claim of restructuring are not valid can be made from (1) her actions in firing Plaintiffs immediately on taking office, without intent to eliminate a position at that time; (2) the fact that the jobs actually performed by Plaintiffs do not mesh with the claimed new jobs, so that it would not be reasonable to expect them to perform such jobs; (3) her statements at her deposition that concerns over loyalty were the reason for her decision to fire Plaintiffs; and (4) the fact that restructuring was never raised as a justification at her deposition when she was asked why she decided to fire Plaintiffs.

Additionally, this case involves the issue of what standard applies to a determination of qualified immunity when an office-holder fires public employees. The District Court granted qualified immunity based on the new job duties allegedly "envisioned" by the auditor. The District Court indicated that because those job duties were political, the Auditor was entitled to qualified immunity. [Dist. Ct. op. at B-19.]

Permitting job duties allegedly "envisioned" by an office-holder to establish qualified immunity is an invalid standard for the reasons discussed above.

Additionally, permitting an office-holder to establish qualified immunity through job duties allegedly "envisioned" would effectively convert the concept of "qualified immunity" to one of "absolute immunity." Any office holder would be entitled to qualified immunity through a claim that they "envisioned" political job duties.

The actual job duties of a fired public employee must be relevant to the determination of whether or not such employees can be fired for political reasons, as well as to the determination of whether or not an office-holder is entitled to qualified immunity.

If the actual job duties are not considered, [1] there is no meaning to *Elrod* and its progeny because any employee could have their job designated as a "political" one based on what an office-holder "envisions"; and [2] any office-holder would be able to establish "qualified immunity", improperly converting "qualified immunity" into "absolute immunity."

There must be a legitimate basis for the office holder to restructure an individual's job into one for which politics is a legitimate requirement. If the actual job duties of the Plaintiffs are not considered, there is no way to make such a determination, and all employees are subject to arbitrary political discharge.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted

STEWART R. JAFFY
(Counsel of Record)
MARC J. JAFFY
Stewart Jaffy & Assoc. Co., L.P.A.
306 E. Gay St.
Columbus, OH 43215
Telephone: 614/228-6148

Attorneys for Petitioners